Supreme Court, U. S.
FILED
JUN 9 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1789

JACK P. ASHMORE, JR. and
R. WALTER ASHMORE, III,
Petitioners,

versus

STATE OF GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

CARL E. SANDERS
JOHN J. DALTON
1400 Candler Building
Atlanta, Georgia 30303
Attorneys for Petitioners

OF COUNSEL:
JUNE ANN KIRKLAND
Troutman, Sanders, Lockerman & Ashmore
1400 Candler Building
Atlanta, Georgia 30303

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

INDEX

Page

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes Involved 3

Statement of the Case 4

Reasons for Granting the Writ 6

Conclusion 16

Appendices 1a

AUTHORITIES CITED

Cases:

Aiken v. Wallace, 134 Ga. 873, 68 S.E. 937 (1910) 8

American Railway Express Co. v. Kentucky, 273 U.S. 269, 47 S. Ct. 353, 71 L.Ed. 639 (1927) 12

Atlantic Coast Line Railroad Co. v. Phillips, 332 U.S. 168, 67 S. Ct. 1584, 91 L. Ed. 1977 (1947) 12

Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 94 S. Ct. 517, 38 L.Ed.2d 526 (1973) 6

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930) 6

County of Hawaii v. Sotomura, 55 Haw. 176. 517 P.2d 57 (1973), *cert. denied* 419 U.S. 872 (1974) 6-7

AUTHORITIES CITED (Continued)

Page

Delmar Jockey Club v. Missouri, 210 U.S. 324, 28 S. Ct. 732, 52 L.Ed. 1080 (1908) 12

Estes v. Texas, 381 U.S. 532, 85 S. Ct. 1628, 14 L.Ed.2d 543 (1965) 16

Hughes v. Washington, 389 U.S. 290, 88 S. Ct. 438, 19 L.Ed.2d 530 (1967) 6,7,8,11

Johnson v. Mississippi, 403 U.S. 212, 91 S.Ct. 1778, 29 L.Ed.2d 423 (1971) 16

Johnson v. State, 114 Ga. 790, 40 S.E. 807 (1902) ... 8

Mayberry v. Pennsylvania, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971) 16

McCoy v. Union Elevated Railroad Co., 247 U.S. 354, 38 S. Ct. 504, 62 L.Ed. 1156 (1918) 12

Rauers v. Persons, 144 Ga. 23, 86 S.E. 244 (1915) 9

Roberts v. New York, 295 U.S. 264, 55 S.Ct. 689, 79 L.Ed. 1429 (1935) 12,16

Sotomura v. County of Hawaii, 402 F. Supp. 95 (D. Haw. 1975) 6

West v. Baumgartner, 124 Ga. App. 318, 184 S.E.2d 213 (1971), *rev'd on other grounds*, 228 Ga. 671, 187 S.E.2d 665 (1972) 10

AUTHORITIES CITED (Continued)

Page

Statutes:

Ga. Code §85-1307, Section 1 of Georgia Laws 1902, p. 108 10

Ga. Code §85-1309, Section 3 of Georgia Laws 1902, p. 108 3,4,8,11,13,15

Other Authorities:

Fifth Amendment to the Constitution of the United States 12,17

Fourteenth Amendment to the Constitution of the United States 12,17

Article I, Section VI, Paragraph I of the Georgia Constitution of 1945, Ga. Code §2-601 9

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No.

JACK P. ASHMORE, JR. and
R. WALTER ASHMORE, III,
Petitioners,

versus

STATE OF GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioners, Jack P. Ashmore, Jr. and R. Walter Ashmore, III, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered in this case on February 24, 1976.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia (Appendix pp. 3a-37a) is reported at 236 Ga. 401. The Southeastern citation is not yet available. The Order entered March 11, 1976, denying the Ashmores' motion for rehearing is at Appendix pp. 1a-2a. The Order of

the Glynn County Superior Court granting the Ashmores' motion to dismiss and motions for summary judgment and denying the motions for summary judgment of the State and Lines, et al. (Appendix pp. 38a-40a) is not reported.

JURISDICTION

The opinion and judgment of the Supreme Court of Georgia were issued on February 24, 1976. The Order of the Supreme Court of Georgia denying the Ashmores' motion for rehearing was issued March 11, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

I. Whether the decision of the Supreme Court of Georgia worked an unpredictable change in state law, so as to deprive petitioners of due process and take their property for public purposes without compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

II. Whether the construction of Georgia Code §85-1309 by the Supreme Court of Georgia constitutes such gross and obvious error, arbitrary action, or coming close to the boundary of arbitrary action, that petitioners were deprived of due process and their property was taken for public purposes without compensation in violation of the Fifth and

Fourteenth Amendments to the Constitution of the United States.

STATUTES INVOLVED

This case involves Ga. Code §85-1309, Section 3 of Georgia Laws, 1902, p. 108, which section is set out below:

> An Act to fix and prescribe the boundaries of land adjacent to or covered by or bordering on the tide-waters of this State, and to prescribe all rights of the owners of such adjacent lands within such boundaries, and to define navigable tide-waters, and for other purposes.
>
> Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same,
>
> SEC. 3. Be it further enacted by the authority aforesaid, That for all purposes, including among others the exclusive right to the oysters and clams (but not to include other fish) therein or thereon being, the boundaries and rights of owners of land adjacent to or covered in whole or in part by navigable tide-waters, as defined in section 2 of this Act, shall extend to low water mark in the bed of the water; provided, however, that nothing in this Act contained shall be so construed as to authorize such an exclusive appropriation of any tide-water, navigable or unnavigable, by any person whomsoever, as to prevent the free use of

the same by others for purposes of passage and for the transportation of such freights as may be capable of being carried thereover.

STATEMENT OF THE CASE

On December 6, 1973, both the State of Georgia and Alva B Lines, et al. filed suit against Petitioners, Jack P. Ashmore, Jr. and R. Walter Ashmore, III (hereinafter the Ashmores), in the Superior Court of Glynn County to prevent the Ashmores from constructing condominiums, previously approved by local zoning authorities, on an upland portion of a tract of land of approximately thirteen acres, bounded on the east by the Atlantic Ocean, on St. Simons Island, Glynn County, Georgia. Both the State and Lines claimed title to the property, and the State claimed certain rights in the property. The cases were consolidated before the Superior Court.

The property in question consisted of both upland, above the high water mark, and the foreshore, the land between the high water mark and the low water mark. The Ashmores' title to the foreshore was dependent upon Ga. Code §85-1309, Section 3 of Georgia Laws 1902, p. 108 (hereinafter the 1902 Act).

The Ashmores moved to dismiss the State's Complaint for failure to state a claim upon which relief could be granted and all parties filed motions for summary judgment. The Superior Court granted the Ashmores motions and denied the motions of the State and Lines. (App. pp. 38a-40a). The State and Lines appealed to the Supreme Court of Georgia. On February

24, 1976, the Georgia Supreme Court reversed, holding title to the foreshore to be in the State and title to the upland to be in the adjacent subdivision owners, Lines, et al., and remanded as to the question of rights which the State might have in the upland. (App. pp. 3a-37a).

In holding title to the foreshore to be in the State, the Georgia Supreme Court construed the 1902 Act to give the owners of land adjacent to navigable tidewaters not title extended to the low water mark, but merely an exclusive right to oysters and clams between the high water mark and the low water mark. This unforseeable decision was in direct opposition to plain terms of the statute and all relevant precedent in the State.

The Ashmores, on March 5, 1976, filed a Motion for Rehearing, asserting that the decision of the Supreme Court of Georgia in regard to the construction of the 1902 Act constituted a taking of private property for public purposes in violation of the Fifth Amendment to the Constitution of the United States, the Fifth Amendment having been made applicable to the States by the Fourteenth Amendment. (App. pp. 40a-47a). On March 11, 1976, the Supreme Court of Georgia denied the motion for rehearing without opinion. (App. pp. 1a-2a).

By application for a writ of certiorari, Petitioners seek review of the Georgia Supreme Court's determination that the State, rather than the adjacent landowner, holds title to the foreshore, the land between the mean high water mark and the mean low water mark, on navigable tidewaters.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This Court should review the decision of the Supreme Court of Georgia because that Court has rendered a decision which is in violation of principles set forth in applicable decisions of this Court and has decided an important question of federal law which has not been, but should be, settled by this Court.

This Court has, in recent years, been concerned with attempts by states to claim privately owned property without exercising the right of eminent domain and without compensating the owners of such land. *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973); *Hughes v. Washington*, 389 U.S. 290 (1967). Where the taking is attempted by an exercise of the state's legislative power, the transgression of constitutional rights is obvious. However, where the same result is achieved through judicial decision setting forth a new rule of law or construing a provision of a state constitution or statute, the violation is more subtle, although a violation nonetheless. *See Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930). Such a violation is, in fact, more egregious than legislative transgression, and this Court is the only forum in which such a violation can be rectified. As the limits to which state courts may go in effecting an unconstitutional taking without fear of interference in their decisions, have not been clearly defined, the way is left open for confusion as to the extent to which state court decisions will be allowed to affect vested private rights. *See, e.g., County of Hawaii v. Sotomura*, 55 Haw. 176, 517 P.2d 57 (1973), *cert. denied*, 419 U.S. 872

(1974); *Sotomura v. County of Hawaii*, 402 F. Supp. 95 (D. Haw. 1975).

In the *Hughes* case, *supra*, at 296-297, Justice Stewart warned that "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." Yet this is precisely what the Supreme Court of Georgia has done. It is essential to the protection of private property rights that this Court provide desperately needed guidelines for such actions by state courts. Without guidance from this Court, such cases will be seen with increasing frequency as states respond to the pressure to preserve environmentally sensitive land and to maintain larger areas for the enjoyment of the public as a whole. While such goals may be admirable, the states must not be allowed to accomplish them at the expense of the private property owner in contravention of constitutionally protected rights.

I.

The Decision of the Supreme Court of Georgia Worked an Unpredictable Change in State Law, Resulting in a Deprivation of Due Process and a Taking of Private Property for Public Purposes without Compensation.

While the construction of a state statute by that State's highest court would ordinarily bind this Court, here, as in *Hughes v. Washington*, *supra* at 296, the state and federal questions are "inextricably intertwined." If it cannot reasonably be said that merely

the right to cultivate shellfish in, rather than title to, the foreshore was given by the 1902 Act to riparian owners adjacent to navigable tidewaters, the effect of the decision of the Supreme Court of Georgia is to take from Petitioners without compensation, land to which they or their predecessors have held title since 1902.

In order to resolve the federal question, it is necessary for this Court to make a determination of its own as to who owned the foreshore from 1902 to the present. And to the extent that the Georgia decision constitutes a sudden change in state law, based on examination of relevant precedents, no deference to the state decision is appropriate. *Hughes v. Washington*, *supra* at 296.

The 1902 Act was passed to overcome the effect of the decision of the Supreme Court of Georgia in *Johnson v. State*, 114 Ga. 790, 40 S.E. 807 (1902), which held that the Georgia statute which set the boundary of lands adjoining navigable streams at the low water mark was not applicable to lands adjacent to navigable tidewaters, thus leaving such land bounded by the high water mark. It is inherent in the opinion in *Johnson* that had the Court found the statute to have been applicable, it would have held that *title* in the land in question extended to the low water mark. As a result of the *Johnson* decision, it was necessary to establish such a boundary by legislative action.

The Supreme Court of Georgia early recognized that Section 3 of the 1902 Act, dealing with land adjacent to navigable tidewater, granted title. In *Aiken v. Wallace*, 134 Ga. 873, 68 S.E. 937 (1910), the Court held

that the 1902 Act did not attempt to take title to the foreshore from a private party, who held such title by virtue of an original land grant to the low water mark, and give it to the adjacent private property owner who held title to the high water mark. However, the opinion clearly indicates that the 1902 Act did undertake to pass some title. The only title which it could convey was that held by the State, and it was this title which was granted to those who held property adjacent to navigable tidewaters.

The extension of title effected by the 1902 Act was again recognized in *Rauers v. Persons*, 144 Ga. 23, 86 S.E. 244 (1915), which was an action by the owner of St. Catherine's Island to enjoin the defendants from using an inlet on the Island for fishing and other purposes. Since the inlet was found to be navigable, the Georgia Supreme Court ruled that the defendants could not be enjoined from going upon and fishing in the waters of the inlet. However, there was evidence to the effect that the defendants were using land above the low water mark. Accordingly, the Court stated,

> "Inasmuch as the property rights of the plaintiffs extend to low water mark, the plaintiffs were entitled to an injunction restraining the defendants from this trespassing upon their land in the manner set out in the petition, and shown by the evidence." 144 Ga. at 25.

That it was an accepted fact that the 1902 Act conveyed title, not just limited rights, can be seen in the constitutional provision which ratified and confirmed the Act. Article I, Section VI, Paragraph I of the Georgia Constitution of 1945 provides as follows:

> "*Tidewater titles confirmed.* The Act of the General Assembly approved December 16, 1902, which extends the title of ownership of lands abutting on tidal water to low water mark is hereby ratified and confirmed." Ga. Code §2-601.

Most recently, the court in *West v. Baumgartner*, 124 Ga. App. 318, 184 S.E.2d 213 (1971), *rev'd on other grounds* 228 Ga. 671, 187 S.E.2d 665 (1972), plainly stated that the 1902 Act conveyed title to land. In holding that the grant of title in Section 1 of the Act, dealing with land adjacent to non-navigable tidewaters, did not include the exclusive right of fishery, the lower court stated,

> "Since, in this case, the act of the State (the Act of 1902) conveying *title* to the lands in the bed of the *navigable* and non-navigable tidal streams as defined in that Act has been ratified and affirmed by the people in a constitutional amendment (Article I, Section VI, Paragraph I of the Constitution of 1945; Code Ann. §2-601), it is not necessary to determine whether the State's right in the land and the waters was a proprietary interest or was in trust for the benefit of the public, which may involve different rights in the State, particularly in so far as the right of the State to give exclusive rights of fishery to one member of the public over another member of the public." [Emphasis added.] 184 S.E.2d at 218-219.

This is a clear statement of state law, that the 1902 Act conveyed title, not only in Section 1 as to land adjacent to non-navigable tidal streams, but also in Section 3 as to land adjacent to navigable tidewaters. The decision of the Georgia Supreme Court, that Section 3 of the 1902 Act granted only certain rights to shellfish and did not convey title to the foreshore, worked an unforseeable change in Georgia property law to the detriment of private property owners. The beach which Petitioners had every reason to regard as theirs was declared by the Supreme Court of Georgia to be in the public domain.

Justice Stewart in *Hughes v. Washington*, *supra* at 298, stated adamantly that this type of action by a state court will not be allowed:

> "Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property — without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment." 389 U.S. at 298.

The Supreme Court of Georgia has engaged in precisely such a taking in total disregard for Petitioners' constitutional right not to have their property taken by the State without being compensated therefor.

II.

The Construction of Georgia Code §85-1309 by the Supreme Court of Georgia Was Such Arbitrary Action That It Constitued a Taking of Property Without Due Process in Violation of the Fifth and Fourteenth Amendments.

Where a decision of the highest court of a state is plainly arbitrary or manifestly wrong, constitutes gross and obvious error, or ignores "plain rights," such decision can be the basis for a claim of taking without due process. *See Atlantic Coast Line Railroad Co. v. Phillips*, 332 U.S. 168 (1947); *Roberts v. New York*, 295 U.S. 264, 277-278 (1935).

This Court in *Delmar Jockey Club v. Missouri*, 210 U.S. 324, 335 (1908), referred to a state court decision which was assertedly "so plainly arbitrary and contrary to law as to be an act of mere spoliation." This Court in *American Railway Express Co. v. Kentucky*, 273 U.S. 269, 273 (1927), stated,

> "We cannot interfere *unless* the judgment amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.' " (Emphasis added).

And in *McCoy v. Union Elevated Railroad Co.*, 247 U.S. 354, 363 (1918), this Court explained,

> "We may examine proceedings in state courts for appropriation of private property to public purposes so far as to inquire whether a rule of law was adopted in absolute disregard of the owner's right to compensation. If the necessary result was to deprive him of property without such compensation, then due process of law was denied him, contrary to the 14th Amendment."

The Supreme Court of Georgia has engaged in the most blatant form of arbitrary action by judicially legislating. It has rewritten Section 3 of the 1902 Act, giving effect to merely a portion of one parenthetical phrase in that Act. It is not judicial construction of a statute to ignore and leave without meaning the major portion of the statute. Such action goes beyond mere error and becomes an arbitrary exercise of power, in this case resulting in the taking of Petitioners' property for public purposes without compensation.

The construction of Section 3 of the 1902 Act by the Supreme Court of Georgia leaves meaningless the phrases "For all purposes," "including among others," "the boundaries and rights," and the proviso preserving public rights in the foreshore. If nothing more than "the exclusive right to the oysters and clams" had been given, that could have been stated clearly. There would have been no need for the statement that "For all purposes" the boundaries shall extend to low water mark. The statute states that these purposes are to *include* the exclusive right to oysters and clams, but it in no way indicates that the purposes are *limited* to such an exclusive right. In fact, the right to oysters and clams is included "*among others.*" If

merely the exclusive right to oysters and clams was granted, what are the other purposes? "Among others" is totally read out of the statute.

In addition, it is not reasonable that "boundaries" as used in the statute should refer only to the limit of the right to take oysters and clams as concluded by the majority opinion of the Georgia Supreme Court. The statute does not state that the boundary of the right to take oysters and clams shall extend to low water mark. Instead, it states that "the boundaries *and* rights" shall so extend. The word "boundaries" should not be so interpreted as to make it mere surplusage. The use of "boundaries" in the conjunctive with "rights" indicates that something more than merely the right to take oysters and clams is intended. In addition, in reference to oysters and clams, the legislature used the term "right" in the singular, however in reference to the extension to the low water mark, the term becomes "rights" in the plural. This indicates that not only were the boundaries extended, but also more than one right was given within this area. Just as with the phrase "among others," the Court's construction of the statute ignores these additional rights.

The Court's construction of the 1902 Act, far from giving due weight and meaning to all the words of the statute and giving effect to all of the provisions of the statute, rendered meaningless the major portion of the statute. The Supreme Court of Georgia would have us read the statute as follows: "The exclusive right to the oysters and clams of owners of land adjacent to or covered in whole or in part by navigable tidewaters, as defined in the preceding section, shall extend to low-

water mark in the bed of the water." If this had been the intention of the legislature, it was not necessary that the other provisions of the statute be included. Since such additional provisions were included, it was the duty of the Georgia Court to give them meaning rather than to ignore them.

The Supreme Court of Georgia abandoned its duty and gave an arbitrary meaning to Section 3 of the 1902 Act in response to what it considered to be the wishes of the majority of Georgia citizens. This is made evident by the following statement by Chief Justice Nichols in his dissenting opinion:

> "The question of legislative intent in this case must be decided based upon legislative intent in 1902 and not legislative intent based upon the situation which exists in 1976. In 1902 the foreshore area of this State, which includes thousands upon thousands of acres of marshland, was not considered by the majority of Georgians as having any real value. Since 1902 beach property and marshlands, both of which are included in the definition of foreshore, have become important to a majority of the citizens of Georgia. However, this is no reason to place a meaning upon an Act of the General Assembly different than that intended at the time of its adoption. Would the Court declare today that landowners actually don't own the mineral rights to their property should vast deposits of oil be discovered underlying the surface of the earth in Georgia? While in 1976, it may be incomprehensible to

> assume that the General Assembly intended to give to the adjoining landowners the foreshore of the Georgia coast, yet in 1902 this was not the case and, having concluded that title to such foreshore was granted by the 1902 Act and approved by the people in 1945, I conclude that the effect of the majority opinion is to take private property without the payment of just and adequate compensation as required by the Constitution when private property is taken for public purposes."

The extensive coverage of the case by the local media, tended to characterize it as a decision to either save the beaches for the public or turn them over to unscrupulous developers. Such public concern can act as a barometer to elected officials, be they part of the Judiciary or Executive Branches. This possible partiality to be in accord with public opinion makes even more glaring the denial of Petitioners' constitutional rights. *See Roberts v. New York, supra* at 278; *c.f. Johnson v. Mississippi,* 403 U.S. 212, 216 (1971); *Mayberry v. Pennsylvania,* 400 U.S. 455 (1971); *Estes v. Texas,* 381 U.S. 532, 548 (1965).

CONCLUSION

Petitioners respectfully submit that the decision of the Supreme Court of Georgia works an unpredictable change in State law, that the Court's construction of the State statute is manifestly wrong and grossly and obviously erroneous, and that its decision is a mere arbitrary exercise of power in an attempt to legislate judicially. The decision resulted in the taking of

Petitioners' property for public purposes without compensation and thus deprived Petitioners of their rights under the Fifth and Fourteenth Amendments to the Constitution of the United States. For the foregoing reasons, Petitioners pray that this petition for a writ of certiorari be granted.

Respectfully submitted,

_____

CARL E. SANDERS

_____

JOHN J. DALTON

1400 Candler Building
Atlanta, Georgia 30303

Attorneys for Petitioners, Jack P. Ashmore, Jr. and R. Walter Ashmore, III

Of Counsel:

JUNE ANN KIRKLAND
Troutman, Sanders, Lockerman & Ashmore
1400 Candler Building
Atlanta, Georgia 30303

CERTIFICATE OF SERVICE

This is to certify that I have this day served copies of the foregoing "Petition for a Writ of Certiorari to the Supreme Court of Georgia" upon counsel for all parties by placing copies in the United States Mail, postage prepaid, properly addressed, as follows:

Patricia T. Barmeyer
Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

Moreton Rolleston
Attorney at Law
2604 First National Bank Tower
Atlanta, Georgia 30303

This ____ day of June, 1976.

JOHN J. DALTON

APPENDIX I

SUPREME COURT OF GEORGIA

Atlanta, March 11, 1976

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

State of Georgia v. Jack P. Ashmore, Jr., et al.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied. All the Justices and Judge Robert E. Coker concur, except Nichols, C. J., and Gunter, J., who dissent. Hill, J., disqualified.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA, March 11, 1976

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ HAZEL E. HALLFORD
Deputy Clerk.

SUPREME COURT OF GEORGIA

ATLANTA, March 11, 1976

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Alva B. Lines et al. v. Jack P. Ashmore, Jr., et al.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied. All the Justices and Judge Robert E. Coker concur, except Nichols, C. J., and Gunter, J., who dissent. Hill, J., disqualified.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA, March 11, 1976

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ HAZEL E. HALLFORD
Deputy Clerk

APPENDIX II

In the Supreme Court of Georgia

Decided: FEB. 24, 1976

30176. STATE OF GEORGIA v. ASHMORE, et al. (606)

30177. LINES, et al. v. ASHMORE, et al. (607)

UNDERCOFLER, Presiding Justice.

The court wishes to acknowledge that the factual statement and Division I of this opinion were authored by Justice Gunter.

These two appeals involve claims to the foreshore and claims to land above the foreshore (above the high water mark) as the foreshore moves back and forth, outward toward the ocean and inward toward the land. The litigation began when the State of Georgia filed a complaint against parties who were asserting ownership of the land in question. The present appellees are successors to the earlier defending parties, and appellees assert ownership rights in the land in question in opposition to the claims of the State. By order of the trial judge the appellees were made parties in the trial court. This is Case Number 30176.

The other appeal, Number 30177 here, had its inception when Lines and others, subdivision lot owners, filed their complaint against Glynn County and its board of commissioners and also against the predecessor parties to the present appellees. As in the other case, the present appellees were made parties by

order of the trial court. Lines and the other subdivision lot owners contended below that they had rights in the subject property adverse to the rights of the appellees or that Glynn County had rights in the subject property for the benefit of the public that were adverse to the rights of the appellees. The Glynn County Board of Commissioners filed responsive pleadings that disclaimed any interest in the land in controversy. Therefore, the legal contest in Number 30176 was and is between the State and the appellees, and in Number 30177 between the Lines appellants and the appellees.

The two cases were consolidated in the trial court; the State moved for summary judgment; the Lines appellants moved for summary judgment; the appellees moved to dismiss the State's complaint for failure to state a claim and, alternatively, for summary judgment with respect to the claims asserted by the State; and the appellees also moved for summary judgment with respect to the claims asserted by the Lines appellants. The trial court then entered the following judgment:

> After hearing oral argument and considering the written briefs of counsel, and upon consideration of the pleadings and all evidence and stipulations of record, the Court finds that there is no genuine issue as to any material fact and that the Defendants Jack B. Ashmore, Jr. and R. Walter Ashmore, III, are entitled to judgment as a matter of law. The Motion for Summary Judgment by the State of Georgia is hereby denied and the Motion for Summary Judgment by the Plaintiffs Alva B. Lines, et al., is hereby denied. The motion by the defendants Jack B. Ashmore, Jr. and R. Walter Ashmore, III to dismiss the complaint of the State of Georgia, and each count thereof, for failure to state a claim upon which relief can be granted, and for summary judgment with respect to the claims asserted by the State of Georgia, are hereby granted and judgment is hereby entered in favor of the defendants, Jack P. Ashmore, Jr. and R. Walter Ashmore, III and the motion by the defendants Jack P. Ashmore, Jr. and R. Walter Ashmore, III for summary judgment with respect to the claims asserted by the plaintiffs Alva B. Lines, et al., is hereby granted. Judgment is hereby entered in these consolidated cases in favor of the defendants Jack B. Ashmore, Jr. and R. Walter Ashmore, III.

The State and the Lines appellants have come here and contend that the judgment below was erroneous. We reverse the judgment and remand the cases to the trial court for further proceedings consistent with this opinion.

I

THE CONSTITUTIONAL ISSUE

The first issue, crucial to a decision in both cases, involves the constitutionality of a 1902 statute that was ratified and confirmed in Georgia's 1945 Constitution. (Code Ann. Sec. 2-601).

In 1902 this court held that the boundary of a landowner whose property abutted on the ocean was the

"ordinary high-water mark." *Johnson et al. v. The State*, 114 Ga. 790, (40 SE 807) (1902). Following this decision the General Assembly enacted the statute now in question. Acts 1902, pp. 108, 109; Ga. Code Ann. Secs. 85-1307, 85-1308, and 85-1309. The title of the 1902 Act is: "Boundaries of Lands on Tide-Waters." The caption of the 1902 Act reads: "An Act to fix and prescribe the boundaries of land adjacent to or covered by or bordering on the tide-waters of this State, and to prescribe all rights of the owners of such adjacent lands within such boundaries, and to define navigable tide-waters, and for other purposes." Section 3 of the 1902 Act reads:

> Be it further enacted by the authority aforesaid, That for all purposes, including among others the exclusive right to the oysters and clams (but not to include other fish) therein or thereon being, the boundaries and rights of owners of land adjacent to or covered in whole or in part by navigable tide-waters, as defined in section 2 of this Act, shall extend to low water mark in the bed of the water; provided, however, that nothing in this Act contained shall be so construed as to authorize such an exclusive appropriation of any tide-water, navigable or unnavigable, by any person whomsoever, as to prevent the free use of the same by others for purposes of passage and for the transportation of such freights as may be capable of being carried thereover.

The constitutionality of the 1902 Act was questionable after its enactment. The State now contends that it was and is unconstitutional, and that its

attempted ratification and confirmation by the 1945 Constitution was ineffective. The State contends that the attempted constitutional ratification and confirmation in 1945 of the 1902 Act, which was unconstitutional when enacted in 1902, cannot breathe life and validity into the 1902 Act. The State's argument is, in short, that zero raised to the second power is still zero.

We reject this contention of the State on the basis of this court's decision in *Hammond v. Clark*, 136 Ga. 313, (71 SE 479) (1911). In a preceding case, *Clark v. Hammond*, 134 Ga. 792, (68 SE 600) (1910), this court had held a series of statutes unconstitutional. The 1910 General Assembly proposed a constitutional amendment, later ratified by the voters, that ratified, validated, and confirmed the series of statutes that had been declared unconstitutional by this court. This court then held in the 1911 case, *Hammond v. Clark*, *supra*, that: "The amendment revitalized the acts, established a rule for the future, and ratified what had been done in the past." P. 337.

We therefore hold that the constitutional ratification in 1945 of the 1902 Act, which had been in effect since its enactment and had not been held to be unconstitutional, was effective. In short, the 1945 constitutional ratification immunized the 1902 Act from a later successful constitutional attack.

II

THE EFFECT OF THE 1945 CONSTITUTIONAL PROVISION

Art. 1, Sec. 6, Par.1 (Code Ann. Sec. 2-601)

The 1945 Constitution provides: "The Act of the General Assembly approved December 16, 1902, which extends the title of ownership of lands abutting on tidal water to low water mark is hereby ratified and confirmed."

This constitutional provision ratified an Act approved December 16, 1902. There were a number of acts approved that day. The provision does not ". . . extends title of ownership of lands abutting on tidal water to low water mark" as might appear from a casual reading. This language was inserted to identify *which* Act approved on December 16, 1902, was being ratified. As stated in the constitutional provision, "The Act of the General Assembly approved December 16, 1902, *which* extends title . . ." This phrase is not self-executing and is neither mandatory nor directory. It is merely for the purpose of identification. Additionally, this identifying phrase contradicts the caption of the very 1902 Act it is ratifying. That caption states, "An Act to fix and prescribe the boundaries of land adjacent to or covered by or bordering on the tide-waters of this State, and to prescribe all rights of the owners of such adjacent lands within such boundaries, and to define navigable tide-waters, and for other purposes." Acts 1902, p. 108. Furthermore, this identifying phrase contradicts the body of the 1902 Act it is ratifying. The Act shows that the title of all land-owners abutting tidal water was not extended to the low water mark. Section 1 of the Act vests title to the beds of *non-navigable* tide-waters to the main thread or channel of the water. We do not construe "Title to the beds." However, whatever title was granted in Section 1 of the 1902 Act extends *below the low water mark* in *non-navigable* tide-waters. It extends to the thread of

the water, not to the low water mark indicated in the 1945 constitutional provision. Also Section 3 of the 1902 Act makes no mention of title, only *rights* are given to the low water mark in *navigable* waters. The 1945 constitutional provision makes no distinction between navigable and non-navigable tide-waters. The 1902 Act, both the caption and the body, makes a clear distinction between navigable and non-navigable tide-waters and grants different rights to the owners of lands adjacent thereto. The purpose of this phrase in the 1945 Constitution can only be to identify the Act being approved. To ratify the 1902 Act and to extend titles to the low water mark is contradictory. In order to reconcile the contradictions this court need only look at the record of the 1943-4 Constitutional Commission to determine what was intended. Those proceedings were as follows:

> MR. GOWEN. Governor, I have written to each member of the Commission before I knew we were going to be called back, with reference to a provision that some people down on the Coast think should be in the Constitution. I think I made myself clear in the letters that I wrote, but the situation has been on the Coast that under an Act of 1902 the Legislature undertook to extend the ownership of property owners abutting on the tidal land in high water marks to low water marks. The purpose was to give somebody title to the oyster beds. At that time the oyster beds had been depleted, and the idea was if the private property owner owned the oyster beds they could afford to replant them and patrol them and under-

take to restore the oyster industry to the State of Georgia. So far as I know this Act has not been attacked, and people have hesitated to plant oyster beds because they think the Act of 1902 infringes on the Constitutional provision preventing the granting of the property of the State; and the suggestion was made that as soon as the war is over there are a number of people who are willing to make large investments in trying to replant oysters in the State of Georgia. I had occasion to look at some statistics, and Georgia, prior to 1890, was one of the largest oyster producing States in the Union; and at the present time it is the smallest State. I talked with Dr. Creaser, who is Supervisor of Coastal Fisheries. The State takes the position they can't plant oyster beds because the title belongs to somebody else; and under another Constitutional provision the State can't improve the property, and nobody has done anything about planting oysters. In addition to bringing new industries, the planting of oysters increases fish, because the oyster is where the small fish hide from the large fish, and where you have plenty of oyster beds you have good fishing, and the suggestion has been made that at the end of Article XII of the Constitution a provision substantially such as this, be made: "The Act of the General Assembly approved December 16, 1902, which extends the title of ownership of land abutting on tidal water to low water mark, is hereby ratified and con-

firmed." I believe if that was done it would do away with the possibility of the law being unconstitutional, and would permit people to spend thousands of dollars necessary to plant them and spend the additional amount necessary to patrol the beds until such time as the oysters got to sufficient size to harvest. At the present time the fear they have is that if the oyster beds are planted some fellow will go in and harvest them, and the Court would declare he was properly doing so because they were on public domain and he was as much entitled to them as the other man. I do want to say this; I want to be fair with the members of the Commission. At least two of the sea-food people on the coast of Georgia regularly maintain my law firm to represent them, and I don't want the Commission to think I am undertaking to earn a fee or represent these people. A great many others that I don't represent, and the ones that I do came to me about it, other than that; but there are two firms that pay us a regular retainer, and I want to make that clear to the Commission.

MR. CULPEPPER. Do your people down there want this?

MR. GOWEN. Yes, sir, the oyster people want it, and there is no objection from the Supervisor of Coastal Fisheries.

MR. ATKINSON. Isn't that what everybody considers the law?

MR. GOWEN. It has been the law for forty-two years, and people have sold property on the basis that it was the law, and nobody questioned it.

MR. CULPEPPER. I move its adoption.

MR. POPE. I second the motion.

JUDGE MacINTYRE. What do the others say?

MR. GOWEN. There is a difference of opinion. In Virginia the Chesapeake Bay Section, all the oysters are owned by the State and leased to the people, and in South Carolina they are individually owned and in North Carolina they are individually owned. It differs with the States. It might be open to argument. If this Act of 1902 had never been passed it might be better to let the State own them all, but I don't believe the State itself would want to undertake to pay back the few people that have planted them.

. . .

JUDGE SMITH. Mr. Gowen, I want to make this suggestion, it might be a substitute motion: Might we not, rather than incorporate in this Constitution the wording as suggested by Mr. Gowen, confirm an act of the legislature. It appears to me it would be better merely to incorporate the language of

the Act to be confirmed rather than confirm it by reference to the Act?

MR. GOWEN. I have no objection to doing that.

JUDGE SMITH. It would save them in time to come to the constitutionality of the act. I make the substitute motion that the wording of the act be incorporated in the Constitution rather than confirming the Act by reference.

MR. GOWEN. The Act is about a page. It is really too long and it gets into too much detail. The Act does contain a provision that I think is very important that it is not necessary to have in the Constitution, and that reserves the right of notification and the right to use the area when it has water in it. No question of being able to go up and down stream.

JUDGE SMITH. Does not the act contain all the pertinent matter you want confirmed by the Constitution?

MR. GOWEN. Yes, sir.

CHAIRMAN ARNALL. Judge Smith offers a substitute motion that the Act of December 16, 1902, in its entirety, be inserted in the Constitution.

MR. GOWEN. I think it is too long. Let me ask unanimous consent to give me until the noon hour to draw something else and submit it.

MR. CULPEPPER. Don't what you have cover it?

MR. GOWEN. It covers it.

MR. CULPEPPER. I move the adoption of the amendment offered by the gentleman from Glynn.

MR. HAAS. I don't understand why the act has never been questioned since 1902.

MR. GOWEN. I believe most of the lawyers here would agree with you if the constitutionality had ever been questioned it would have been declared unconstitutional. It has not been questioned because nobody has done anything about it, but the way it would seem and be questioned — by plants and oyster beds, and you come and harvest my oysters and I have you arrested for trespassing on my property and taking my property, and you try to prosecute him in court; then you raise the point that you have not taken any oysters because they did not belong to me, even though I planted them, and even though for forty-two years I thought they belonged to me; and if the courts hold you have the right to get them, then everybody else has equal right.

MR. FOLEY. I second Mr. Culpepper's motion.

CHAIRMAN ARNALL. The first motion will be Judge Smith's motion that the entire Act of December 16, 1902, be incorporated in the Constitution. So many as favor Judge Smith's motion make it known by saying "aye"; opposed "no." The nos seem to have it.

Now the question is on Mr. Culpepper's motion, seconded by Mr. Foley, that this language be inserted in the Constitution: "The Act of the General Assembly approved December 16, 1902, which extends the title of ownership of land abutting on tidal waters to low-water marks is hereby ratified and confirmed." Any discussion? Is there objection? The Chair hears none and it is so ordered. Records of Constitutional Commission, 1943-44, Vol. 2, p. 360-363.

It is clear beyond any doubt that the constitutional commission intended to ratify the 1902 Act, nothing more. As shown therein, it was proposed originally to set out the 1902 Act verbatim in the 1945 Constitution but because of its length, they chose just to ratify the 1902 Act. There was not the faintest intention of altering the 1902 Act. Any argument that the 1945 Constitution by its own terms extended the titles of landowners adjacent to tide-waters to the low water mark is completely contrary to the intention of the Constitutional Commission and is untenable.

Whatever rights the individual parties to this case may have in the foreshore must be determined under the 1902 Act.

III

THE EFFECT OF THE 1902 ACT

(Acts 1902, p. 108; Code Secs. 85-1307, 85-1308, 85-1309)

Prior to the 1902 Act the title and ownership of the foreshore was in the State of Georgia. This was the common law and the law in Georgia. It was stated by this court on February 3, 1902, in *Johnson v. State*, 114 Ga. 790 (40 SE 807), a case involving an indictment for illegally taking oysters from an alleged private oyster bed. The oyster bed was located in tidal waters between the high and low water marks. *Johnson* held that title to the tidal water and underlying land was vested in the State of Georgia and was *public* land. Therefore, the defendant could not be convicted of taking oysters from a *private* oyster bed which was located on public land. The decision apparently discouraged "oystermen" because many oyster beds are located between the high and low water marks of tidal waters. Oyster beds are frequently planted and cared for at substantial cost. However, under *Johnson*, the land between the high and low water marks was public land and "oystermen" had no private rights in the oyster beds they may have located on public land. This made an investment in planting oyster beds hazardous and, it was argued, deterred the growth of the commercial oyster industry. Consequently, it is agreed by most scholars that the 1902 Act was adopted to meet the *Johnson* decision and give some rights

to "oystermen" so that their beds would be protected. This is evident from the 1943-4 Constitutional Commission's discussion surrounding the adoption of the 1945 constitutional provision ratifying the 1902 Act. There it was stated that the constitutionality of the 1902 Act was in question and that the provisions of the Act should be ratified by the Constitution. In proposing such ratification, it was stated, "The purpose [of the 1902 Act] was to give somebody *title* to the *oyster beds*. At that time the oyster beds had been depleted, and the idea was if the private property owner owned the oyster beds they could afford to replant them and patrol them and undertake to restore the oyster industry to the State of Georgia." (Emphasis supplied.)

This history is important because it has a bearing upon the proper interpretation of the intention of the 1902 Act. Primarily the purpose of the 1902 Act was to overcome this court's decision in *Johnson* and to give "oystermen" a property right in oyster beds, particularly oyster beds they had planted.

Also, the facts and the statements of this court in *Johnson* are important in ascertaining the intention of the legislature in the 1902 Act and in interpreting the meaning of the language used. In *Johnson* the defendant contended and this court concluded that the tidewater between high and low water marks and the underlying land was owned by the State. In opposition to this contention the State argued that Code Sec. 85-1303 (then Civil Code Sec. 3059) defining a navigable stream and Code Sec. 85-1304 (then Civil Code Sec. 3060) defining the adjacent owner's rights in navigable streams applied to tide-waters and the adjacent landowner's title extended to the low water mark.

Code Sec. 85-1303 defines a navigable stream. Code Sec. 85-1304 states, "Rights of owners of lands adjacent to navigable streams. The rights of the owner of lands adjacent to navigable streams extend to low-water mark in the bed of the stream." Although this court in *Johnson* held these code sections referring to *streams* did not apply to *tide-waters* it is critical to read what the court said these code sections did provide. It is important because the 1902 Act was adopted to overcome the *Johnson* decision. In *Johnson*, this court said, "From all the light before us, we think it most reasonable to suppose that the intention of the lawmaking power, as expressed in sections 3059 and 3060 of the Civil Code (now Code Secs. 85-1303 and 85-1304), was not to change the common law with reference to the boundaries of landowners abutting on the sea or any of its inlets, *but rather to insure to riparian owners the right to the river-bottom upon their land for agriculture purposes.*" (Emphasis supplied.)

Thus, this court said that Code Sec. 85-1304 which provides, "The *rights* of the owner of lands adjacent to *navigable streams* extend to low-water mark in the *bed of the stream*" meant, ". . . the *right* to the *river bottoms upon their land for agriculture purposes.*" (Emphasis supplied.)

To overcome the *Johnson* decision and its holdings, the legislature adopted the 1902 Act. What did the 1902 Act do?

The legislature distinguished between non-navigable tide-waters and navigable tide-waters. A definition stating what is navigable is set out in Sec-

tion 2 of the 1902 Act (Code Sec. 85-1308). Basically it is the same definition contained in Code Sec. 85-1303 for fresh water.

The tide-waters involved in the instant case are on the shores bordering the Atlantic Ocean. The Atlantic Ocean is a "sea." Sec. 2 of the 1902 Act (Code Sec. 85-1308) declares "a sea" to be navigable tide-water provided it is used for purposes of navigation or is capable of bearing upon its *bosom* at mean low tide, boats loaded with freight in the regular course of trade. The Atlantic Ocean can bear upon its bosom freight boats and in fact does. Therefore, the tide-waters in the instant case are classified as navigable waters under the definition of the 1902 Act. The 1902 Act contemplates only two categories, non-navigable and navigable tide-waters.

Having determined that the tide-waters in the instant case are navigable, what did the 1902 Act provide? Section 1 of the 1902 Act need not be considered here because it deals with landowners adjacent to *non-navigable* tide-waters. Section 3 of the Act deals with landowners adjacent to *navigable* tide-waters. (Code Sec. 85-1309).

It provides, "For all purposes, including among others the exclusive right to the oysters and clams (but not to include other fish) therein or thereon being, the boundaries and rights of owners of land adjacent to or covered in whole or in part by navigable tide-waters, as defined in the preceding section [definition of navigable tide-waters] shall extend to the low water mark in the bed of the water: "Provided, however, ..."

Section 3 does not give the adjacent landowner title to anything. It grants "rights" and nothing more. The "rights" granted are similar rights this court said an adjacent landowner acquired in navigable fresh water streams under Code Sec. 85-1303. In *Johnson* this court said the right acquired was "the right to the river-bottoms upon their lands for agricultural purposes." Using similar language in Section 3 of the 1902 Act, the legislature granted landowners adjacent to navigable tide waters certain rights. Paraphrasing *Johnson*, we think it reasonable to suppose that the intention of the lawmaking power was to insure to riparian owners the right to the tide-waters for all purposes relating to the planting and cultivation of oysters and clams, and an exclusive right to harvest those crops as well as oysters and clams growing there naturally.

We note further that the Code of 1933 which has been enacted into law inserted the following caption to Section 3 of the 1902 Act; "*Rights* of owners of land adjacent to navigable tide-waters." Apparently both the codifiers and the legislature interpreted this section as dealing only with "rights."

We are not concerned here with Section 1 of the 1902 Act (Code Sec. 85-1307). That section deals with *title* to the *beds* of *non-navigable* tide-waters. The instant case is concerned with *rights* in *navigable* tide-waters provided for in Section 3 of the 1902 Act. Section 1 of the 1902 Act has a bearing on the instant case only because it speaks of "title to the beds." Whether this relates to the oyster beds, bottoms, or land is not decided here. What is important is that some sort of title is dealt with. In Section 3 of the 1902 Act, which governs

the instant case, no mention is made of any sort of title. Section 3 only refers to *rights*. Obviously the legislature in Section 3 was granting something less than title. In our opinion nothing but the right to plant, cultivate and harvest oysters and clams was granted. Such a grant solved the problem of the oystermen. They had the exclusive right to the oysters in the tidal waters next to their adjacent land. In our opinion it is a privilege or a license. See Acts 1968, p. 202 (Code Ann. Sec. 45-905.1) et seq. providing a uniform law relating to the zoning of tidal waters and the taking of seafood therefrom.

This conclusion comports with the general principle that a public grant is construed strictly against the grantee and nothing is taken by implication. *McLeod v. Burroughs*, 9 Ga. 213, 221 (3) (1851); *McLeod v. Savannah, A&GR Co.*, 25 Ga. 445, 457 (1858).

The extension of boundaries referred to in Section 3 (Code Sec. 85-1309) does no more than establish the extent of the rights. It conveys no title to the underlying land. See *Johnson v. Arnold*, 91 Ga. 659, 668 (18 SE 370) (1893).

We note that the rights granted by Section 3 of the 1902 Act are subject to certain provisions contained therein such as the reservation of other fish and the rights of public passage.

In our opinion the State has fee simple title to the foreshore in all navigable tide-waters.

Division 2 of Rauers v. Persons, 144 Ga. 23 (86 SE 244) (1915) cannot be accepted as an authorative con-

struction of the 1902 Act. A review of the record in that case shows that the application of the 1902 Act in Division 2 was not challenged, was not considered by the trial court, and actually was not in issue in the case. Division 2 appears to be an aberration because the trial court's denial of an injunction was affirmed despite the holding in Division 2 that an injunction should have been granted. Division 2 is dicta, is unsound, and will not be followed.

IV

ACCRETED LAND

(The "dry sand" area)

"According to the better authorities, the bounding of a tract by the edge or margin of a road will pass the fee to the middle line of the road when the vendor owns the fee on both sides. Upon the like reason, if he owns the fee on one side only, and the whole road is upon the margin of his tract, the proprietor on the opposite side not having any interest in its ownership, a conveyance of the tract as bounded by the margin of the road should, and we think would, pass the fee, in the whole road." Johnson v. Arnold, 91 Ga. 659, 667 (18 SE 370) (1893). Gradual accretions of land from navigable tide waters accrue to the adjacent land owner. Therefore, the accreted land in dispute here accrued to the owners of the lots in the East End Subdivision bounded on the east by Beach Drive. Jones v. Turlington, 243 NC 681 (92 SE2d 75) (1956). There are issues of fact remaining to be resolved by the trial court as to whether the accreted land has been dedicat-

ed to public use or become subject to prescriptive rights.

Judgment reversed. Undercofler, P.J., Jordan, Ingram, Hall, JJ. and Judge Robert E. Coker concur. Nichols, C.J. and Gunter, J. dissent. Hill, J. disqualified.

In the Supreme Court of Georgia. 606 and 607
tr 4

30176. STATE OF GEORGIA v. ASHMORE ET AL.

30177. LINES ET AL. v. ASHMORE ET AL.

NICHOLS, Chief Justice, dissenting.

While I concur in Division One of the majority opinion and the ultimate conclusion reached in Division Two that "whatever rights the individual parties to this case may have in the foreshore must be determined under the 1902 Act," I must dissent from the holding in Division Three that such Act did not grant title to the foreshore.

In *Executors of Henderson v. Alexander*, 2 Ga. 81, 85 (1847), it was said that the court, in construing statutes, would take its guide from the following rules:

"*First.* Statutes that are remedial, are to receive an equitable interpretation, by which the letter of the Act is sometimes restrained and sometimes enlarged, so as more effectually to meet the beneficial end in view, and prevent a failure of the remedy. They are to be construed liberally and *ultra*, but not *contra* to the strict letter. 1 Kent, 464; Dwarris on Stat. 726.

"*Second.* It is the duty of Judges so to construe remedial statutes as to repress the mischief and advance the remedy. 11 Coke, 71 b; 1 Kent, 464; and in the application of this rule they are to consider the law as it stood before the act — the mischief against which it did not provide — the remedy which the Legislature has provided and the reason of the remedy.

"*Third.* The intention of the Legislature is to be deduced from a view of the whole and every part of a statute, taken and compared together. Coke Litt. 381 a; 12 Wheat. R. 332.

"*Fourth.* The real intention of the Legislature when accurately ascertained will always prevail over the literal sense of terms. 1 Kent, 461; 15 Johns R. 380; 14 Mass. R. 92.

"*Fifth.* Several acts *in pari materia* and relating to the same subject are to be taken together and compared in the construction of them, even though some of the statutes have expired, or are not referred to in other Acts. 1 Burrow R. 445; Doug. R. 27; 4 T. R. 447 a 450; Dwarris on Stat. 699."

"[I]t is the duty of the courts in the construction of statutes to give effect to the intention of the legislature

when it is ascertainable (*Thompson v. Eastern Air Lines*, 200 Ga. 216, 222, 39 S. E. 2d, 225): and in construing laws, whether statutory or constitutional, proper regard should be given to the old law, the evil, and the remedy. *Walsh v. City Council of Augusta*, 67 Ga. 293 (1a); *Demere v. Germania Bank*, 116 Ga. 317, 318 (42 S. E. 488); *Georgia Railroad & Bkg. Co. v. Wright*, 124 Ga. 596, 626 (53 S. E. 251)." *Moore v. Baldwin County*, 209 Ga. 541, 545 (74 SE2d 449) (1953).

With these rules in mind, it is necessary to look at the decision of this court in *Johnson v. State*, 114 Ga. 790 (40 SE 807) (1902). The first headnote in this decision reads: "1. In the absence of special title by grant, lease, prescription, or otherwise, the *boundary of a landowner* abutting on the ocean, or on any estuary, bay, inlet, or arm thereof where the tide regularly ebbs and flows, extends only to ordinary highwater mark. Sections 3059 and 3060 of the Civil Code are not applicable to such waters." (Italics supplied.) On Page 791 of this opinion it is said: "At common law, in the absence of any special title by grant or prescription, the *boundary of landowners abutting on the sea*, or upon any estuary, tidal stream, or arm of the sea where there was a regular rise and fall of the tide, extended only to high-water mark. The soil between high-water mark and low-water mark was the property of the crown. This rule, so far as the boundary of the abutting landowner is concerned, has been almost universally followed in the United States. See 4 Am. & Eng. Enc. L. (2d ed.) 818-820, and cases cited; Tyler, Boundaries, 31 et seq." (Italics supplied.)

This same year the General Assembly adopted the Act to be construed. This Act reads as follows in its entirety:

"An Act to fix and prescribe the boundaries of land adjacent to or covered by or bordering on the tide-waters of this State, and to prescribe all rights of the owners of such adjacent lands within such boundaries, and to define navigable tide-waters, and for other purposes.

"Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same,

"SECTION 1. That from and after the passage of this Act the title to the beds of all tide-waters in this State, where the tide regularly ebbs and flows, and which are not navigable under section 2 of this Act, shall vest in the present owner of the adjacent land for all purposes, including among others, the exclusive right to oysters, clams and other shell fish therein or thereon. If the water is the dividing line, each owner's boundary shall extend to the main thread or channel of the water. If the main thread, or center, or channel of the water changes gradually, the line follows the same, according to the change. If for any cause it takes a new channel, the original line, if capable of identification, remains the boundary. Gradual accretions of land on either side accrue to the owner.

"SEC. 2. Be it further enacted by the authority aforesaid, That a navigable tide-water, in contemplation of this Act, is any tide-water, the sea, or any inlet thereof, or other bed of water where the tide regularly ebbs and flows, which is in fact used for the purposes of navigation, or is capable of bearing upon its bosom at mean low tide boats loaded with freight in the regular course of trade. The mere rafting of timber

thereon, or the passage of small boats thereover, whether for the transportation of persons or freight, shall not be deemed navigation within the meaning of this Act, and does not make tide-water navigable.

"SEC. 3. Be it further enacted by the authority aforesaid, That for all purposes, including among others the exclusive right to the oysters and clams (but not to include other fish) therein or thereon being, the boundaries and rights of owners of land adjacent to or covered in whole or in part by navigable tide-waters, as defined in section 2 of this Act, shall extend to low water mark in the bed of the water; provided, however, that nothing in this Act contained shall be so construed as to authorize such an exclusive appropriation of any tide-water, navigable or unnavigable, by any person whomsoever, as to prevent the free use of the same by others for purposes of passage and for the transportation of such freights as may be capable of being carried thereover.

"SEC. 4. Be it further enacted by the authority aforesaid, That all laws and parts of laws in conflict with this Act be, and the same are, hereby repealed.

"Approved December 16, 1902." Ga. L. 1902, p. 108 (Ga. Code Ann. §§ 85-1307, 85-1308 and 85-1309).

In *Johnson v. State*, supra, it was specifically held that those sections of the Code now codified as §§ 85-1303 and 85-1304 were not applicable to land abutting tidal waters.

The General Assembly then enacted the Act in question. Section 2 of this Act follows almost verbatim the

language of now Code § 85-1303 defining a navigable body of water.

Section 1 of this Act, after providing that title to the beds of all tidewaters in this State which are not navigable shall vest in the present owners of adjacent land for all purposes with certain exceptions, provided, with reference to gradual changes in the channel, the exact language that had been applicable prior thereto to non-navigable streams. Compare Code § 85-1302.

Section 3 of the Act then followed the language in the *Johnson* decision by providing the location of the boundary of property abutting navigable tidewaters. The *Johnson* decision placed such *boundary* at the high-water mark and the 1902 Act placed the *boundary* at the low-water mark. Thus, it is seen that the evil sought to be remedied was the holding of this court in *Johnson v. State*, supra, and the only intent that can be gleaned from the Act of 1902 is that the General Assembly intended to extend the *boundary* of land abutting the tidal-waters of this State from the high-water mark to the low-water mark or to the middle of the channel in those cases where the title was not already at the low-water mark or the middle of the channel.

The question of legislative intent in this case must be decided based upon legislative intent in 1902 and not legislative intent based upon the situation which exists in 1976. In 1902 the foreshore area of this State, which includes thousands upon thousands of acres of marshland, was not considered by the majority of Georgians as having any real value. Since 1902 beach

property and marshlands, both of which are included in the definition of foreshore, have become important to a majority of the citizens of Georgia. However, this is no reason to place a meaning upon an Act of the General Assembly different than that intended at the time of its adoption. Would the Court declare today that landowners actually don't own the mineral rights to their property should vast deposits of oil be discovered underlying the surface of the earth in Georgia? While, in 1976, it may be incomprehensible to assume that the General Assembly intended to give to the adjoining landowners the foreshore of the Georgia coast, yet in 1902 this was not the case and, having concluded that title to such foreshore was granted by the 1902 Act and approved by the people in 1945, I conclude that the effect of the majority opinion is to take private property without the payment of just and adequate compensation as required by the Constitution when private property is taken for public purposes. See "Some Legal Problems Involved in Saving Georgia's Marshlands," *Ga. Bar Journal*, August, 1970, p. 27.

Having concluded that the title to the foreshore was not in the State, the defendants in the trial court, under the facts in this case, being successors in title to the subdivider were entitled to the accreted land. Compare *Akin v. Wallace*, 134 Ga. 873 (68 SE 937) (1910).

In the Supreme Court of Georgia

30176. THE STATE v. ASHMORE, et al. (606 to 4)

30177. LINES, et al. v. ASHMORE, et al. (607 to 4)

GUNTER, Justice (dissenting).

The land involved in these cases, asserted by the appellees to be in their ownership subject only to a very limited easement over part of it in favor of the public, is bounded on the east by the Atlantic Ocean, a navigable tidewater. The primary issue for decision is whether the eastern boundary of the land is the high-water mark or the low-water mark as those marks are established by the Atlantic Ocean. Other issues in the cases depend upon and flow from the decision rendered on this primary issue.

The court has held, as I read the majority opinion, that the boundary of land bordering the Atlantic Ocean is the high-water mark, and that the owner of land bounded by the high-water mark has certain limited rights, as conferred by the 1902 Act, in the foreshore area adjacent to his land. The majority holds that the State still owns the foreshore, that area between the high-water mark and the low-water mark, subject only to the limited rights of the landowner whose property is actually bounded by the high-water mark.

This court had held, prior to the enactment of the 1902 Act, that if a landowner's property was bounded by the Atlantic Ocean, the actual boundary line of his property was the high-water mark. *Johnson v. The*

State, 114 Ga. 790, 40 SE 807 (1902). I can only read the 1902 Act to mean that the General Assembly overruled this court's decision in *Johnson v. The State, supra*, by establishing the boundary of land adjacent to the Atlantic Ocean at the low-water mark rather than the high-water mark as this court had ruled. The low-water mark boundary was established by the General Assembly subject to the proviso contained in section 3 of the 1902 Act. The proviso reads: "... provided, however, that nothing in this Act contained shall be so construed as to authorize such an exclusive appropriation of any tidewater, navigable or unnavigable, by any person whomsoever, as to prevent the free use of the same by others for purposes of passage and for the transportation of such freights as may be capable of being carried thereover."

It is therefore my view that since the effective date of the 1902 Act, the eastern boundary of land adjacent to the Atlantic Ocean has been the low-water mark. However, the extension of such boundary from the high-water mark to the low water mark by the General Assembly was specifically subject to an easement in favor of the general public to use the foreshore, the area between high-water mark and low-water mark, for the purposes of fishing, passage, and transportation. But I do not agree with the narrow, limited interpretation of "fishing, passage, and transportation" urged upon the court in this case by the appellees.

The appellees concede that they do not have absolute title to the foreshore by virtue of the 1902 Act, but they contend that the only rights that the people had and have in the foreshore after the 1902 enactment were

and are the "limited rights of navigation and fishing in the waters covering the foreshore." They equate the reservation contained in the proviso of the 1902 Act with the "public trust" concept derived from the Common Law. They argue, citing cases from other jurisdictions, that the only rights reserved to the public under the common law trust doctrine are rights in the waters when such waters cover the foreshore, and that there are no public rights in the foreshore when the waters have receded to the low-water mark. They argue in their brief:

> When waters are at the low-water mark, the public has the privilege of using the water up to that line; when the water is at the high-water mark, the rights of the public are extended accordingly . . . . The rights specifically reserved in the 1902 Act were those of 'fishing,' of 'passage,' and of use 'for the transportation of such freight as may be capable of being carried thereover.' The rights of passage and transportation of freight correspond directly with the common law rights of navigation and commerce. The rights reserved are those basic rights recognized under the common law trust doctrine. There is no justification for an interpretation of the terms of the 1902 Act which would extend the public rights beyond those embraced in the common law trust. Thus, while the public has the right to use the water covering the foreshore for the purposes of passage, transportation of goods, and fishing, there is no basis for the recognition of any other right in this area.

I reject this argument by the appellees. I do not equate the reservation of rights to the people contained in the 1902 Act with the reservation of rights apparently recognized in some jurisdictions under the Common Law trust doctrine. The 1902 Act, as I construe it, extended the boundary of land abutting the Atlantic Ocean from high-water mark to low-water mark, but it also reserved to the people certain rights in the land comprising the foreshore, those rights being passage, fishing, and transportation. The rights reserved to the people by the 1902 Act were not mere rights in the waters which cover the foreshore at high tide and then recede from the foreshore to the low-water mark at low tide.

I conclude that the terms of the proviso in section 3 reserved to the people, and to the State as representative of the people, an easement in and upon the foreshore for: (a) passage by boat, vehicle, or afoot, and (b) transportation by boat, vehicle, or other appropriate means. It is also clear to me from section 3 of the Act that fishing, except for oysters and clams, by the people on the foreshore was not proscribed. In other words, the right of the people to fish on the foreshore from boats, from docks, or afoot was reserved.

I would therefore hold that the boundary of property abutting the Atlantic Ocean is the low-water mark, but that the area between the high-water mark and the low-water mark, the foreshore, is impressed with an easement in favor of the public for fishing, passage, and transportation, as herein defined.

I

The State's Appeal

The trial court dismissed the State's complaint for failure to state a claim. I think this ruling was erroneous. The State, as representative of the people, has standing to bring a complaint for a judicial determination of public rights in land. The appellees and their predecessors, the original defendants, were asserting ownership rights that the State contended were adverse to the rights of the public in the land in question. Therefore, I think the complaint stated a claim, and it should not have been dismissed.

The trial court also granted summary judgment in favor of the appellees and against the State. I think this ruling was also erroneous. I interpret the trial court's judgment as foreclosing and denying certain rights of the people, as asserted by the State, in the foreshore area involved in this litigation. As I have stated hereinbefore, I think the rights reserved to the people in the foreshore cannot be abridged or denied by the appellees. To the extent that the trial court's judgment held otherwise, I would reverse that judgment.

I do not think that the people, and the State as representative of the people, have any property rights in accreted land above the high-water mark, land that is located outside the confines of the foreshore, unless such rights have been acquired by conveyance or prescriptive use. I would reject the State's arguments based on dedication and custom.

II

The Appeal by Lines, et al.

The trial court granted summary judgment in favor of the appellees against these appellants. I think this ruling was erroneous. These appellants, like the people in general, have rights in the foreshore that cannot be abridged or denied by the appellees. Therefore, the judgment below, to the extent that it denied these appellants the right that the public has in the foreshore, should, in my opinion, be reversed.

The rights that these appellants may have or may not have in the accreted land above the high-water mark and outside the confines of the foreshore poses a different problem. These appellants purchased their subdivision lots pursuant to a plat that showed Beach Drive as the eastern boundary of the subdivision. The eastern boundary of Beach Drive was, at that time, the high-water mark and the landward boundary of the foreshore. Since 1911, when the subdivision plat was prepared, the foreshore has moved seaward and accreted land now exists between the eastern boundary of Beach Drive and the present high-water mark. In other words, this accreted land now lies between Beach Drive and the foreshore. The 1911 plat designated the area east of Beach Drive, at that time the foreshore, as "Beach". It is thus seen that the original subdivision owners, and the appellees here are their successors in title, had ownership rights in the foreshore after the passage of the 1902 Act. The land between Beach Drive and the present foreshore is therefore owned by the appellees unless the original subdivision owners, by conveying subdivision lots

pursuant to the prepared plat, granted an easement to the purchasers of lots in the subdivision that would permit such purchasers to use the area east of Beach Drive. I conclude that the public has no rights in this accreted land, and such rights as the purchasers of lots may have is solely by virtue of their being purchasers of land pursuant to a subdivision plat. The appellees acquired their ownership rights in the accreted land from the original subdivision owners. Likewise, the appellants, owners of lots in the subdivision, derive their easement rights, if any, in the accreted land from the original subdivision owners. The contesting parties are therefore asserting rights in the accreted land that have come down to them from a common source of title. I think that this issue between subdivision lot owners and the appellees must yet be determined in the trial court.

Beach Drive has never been opened and maintained as a street. Glynn County does not claim any rights in it. I think that the owners of subdivision lots that abut on the west side of Beach Drive now own the western one-half of Beach Drive. The appellees, whose predecessors in title retained ownership rights in the area east of Beach Drive, now own the eastern one-half of Beach Drive where it abuts accreted land in which they have ownership rights. I think that the appellees' ownership of such eastern one-half of Beach Drive and their ownership of the accreted land east of Beach Drive is subject to any easement thereover that subdivision lot-owners may have, an issue that should hereafter be determined in the trial court.

My determination of the present ownership of Beach Drive is dictated by this court's decision in *Johnson v.*

Arnold, 91 Ga. 659, 18 SE 370 (1892). The "marginal monument rule" does not, in my opinion, apply in this case, because the original subdivision developers retained ownership rights in the area east of Beach Drive, this area being the foreshore when the subdivision plat was prepared.

III

My Conclusions

1. The appellees' land in these cases is bounded by the Atlantic Ocean, and the seaward boundary is the low-water mark. However, appellees' land that lies within the foreshore is subject to an easement in favor of the public as delineated in this dissenting opinion.

2. The people have no rights in accreted land outside the confines of the shifting foreshore unless such public rights have been acquired by conveyance or prescriptive use.

3. The appellants who are subdivision lot owners have no ownership rights in accreted land east of Beach Drive; and such easement rights as these appellants may have, if any, in the eastern one-half of Beach Drive and the accreted land east of Beach Drive should hereafter be determined in the trial court.

I would reverse the judgment below and remand these two cases to the trial court for further proceedings consistent with my views stated in this dissenting opinion.

I respectfully dissent.

APPENDIX III

In the Superior Court of Glynn County
State of Georgia

STATE OF GEORGIA,
Plaintiff,

versus C.A. NO. 14531

JACK P. ASHMORE, JR., et al.,
Defendants.

ALVA B. LINES, et al.,
Plaintiffs,

versus C.A. NO. 14532

JACK P. ASHMORE, JR., et al.,
Defendants.

ORDER

The above cases were consolidated before this Court. Plaintiff State of Georgia has moved for summary judgment and Plaintiffs Alva B. Lines, et al, have moved for summary judgment. The Defendants Jack P. Ashmore, Jr. and R. Walter Ashmore, III have moved to dismiss the Complaint by the State of Georgia, and each count thereof, for failure to state a claim upon which relief can be granted and, alternatively, have moved for summary judgment with respect to the claims asserted by the State of Georgia. The Defendants Jack P. Ashmore, Jr. and R. Walter Ashmore, III have moved for summary judgment with

respect to the claims asserted by Plaintiffs Alva B. Lines, et al.

After hearing oral argument and considering the written briefs of counsel, and upon consideration of the pleadings and all evidence and stipulations of record, the Court finds that there is no genuine issue as to any material fact and that Defendants Jack P. Ashmore, Jr. and R. Walter Ashmore, III are entitled to judgment as a matter of law. The Motion for Summary Judgment by the State of Georgia is hereby DENIED and the Motion for Summary Judgment by the Plaintiffs Alva B. Lines, et al., is hereby DENIED. The motion by the Defendants Jack P. Ashmore, Jr. and R. Walter Ashmore, III to dismiss the Complaint of the State of Georgia, and each count thereof, for failure to state a claim upon which relief can be granted, and for summary judgment with respect to the claims asserted by the State of Georgia, are hereby GRANTED and judgment is hereby entered in favor of the Defendants Jack P. Ashmore, Jr. and R. Walter Ashmore, III and the motion by the Defendants Jack P. Ashmore, Jr. and R. Walter Ashmore, III for summary judgment with respect to the claims asserted by the Plaintiffs Alva B. Lines, et al., is hereby GRANTED. Judgment is hereby entered in these consolidated cases in favor of the Defendants Jack P. Ashmore, Jr. and R. Walter Ashmore, III.

Pursuant to Ga. Code Ann. § 81A-154(h), the Court hereby expressly directs the entry of the final judgments in these consolidated cases in favor of the Defendants Jack P. Ashmore, Jr. and R. Walter Ashmore, III based upon the Court's express deter-

mination that there is no just reason for delay in taking such action.

SO ORDERED, this 26th day of March, 1975.

/s/ GORDON KNOX, JR.
Gordon Knox, Jr., Judge
Superior Court of Glynn County
Brunswick Judicial Circuit

APPENDIX IV

In the Supreme Court of Georgia

STATE OF GEORGIA,
Appellant,

versus NO. 30176

JACK P. ASHMORE, JR., et al.,
Appellees.

ALVA B. LINES, et al.,
Appellants,

versus NO. 30177

JACK P. ASHMORE, JR., et al.,
Appellees.

MOTION FOR REHEARING

Filed: Mar. 5, 1976

COME NOW Appellees, Jack P. Ashmore, Jr. and R. Walter Ashmore, III, and within the time allotted by

law and the rules of this Court, move for a rehearing and reversal of the decision rendered by this Court on February 24, 1976. The decision rendered on that day was contrary to contentions of the Appellees, and Appellees respectfully submit that in rendering said decision, the Court erroneously construed or misapplied or overlooked controlling legal authorities which require a different judgment from that rendered.

PRELIMINARY STATEMENT

By holding that the marginal road rule is applicable to the present case, this Court has implicitly held that Appellees' predecessors in title retained no interest east of the area designated Beach Drive. However, it seems improbable that this Court intended such a result. At the time the land in question was platted, the grantors, the Appellees' predecessors in title, owned the platted lots and the area designated as Beach Drive. Now, under this Court's interpretation of the 1902 Act, the grantors also owned an exclusive right in the nature of an easement to take the oysters, clams, and other shellfish in the foreshore and to cultivate such shellfish between the high and low water marks. The grantors conveyed certain lots by metes and bounds, describing such lots as bounded on the east by Beach Drive. In none of these deeds did the grantors convey their exclusive right to the oysters, clams and other shellfish. Had the deeds recited the ocean as the eastern boundary, there might have been some basis for a finding by this Court or the trial court that the grantors' rights in the foreshore had passed with the conveyance of the upland subdivided lot. However, there seems to be no basis for finding that the grantors

conveyed their valuable right to take shellfish when they made no conveyance bounded by tidewaters and made no specific grant of such right.

In addition, Appellants, who claim the accreted land in contravention of Appellees' record title, had presented no evidence to the trial court establishing that the grantors owned no land to the east of Beach Drive *at the time the lots bordering on Beach Drive were conveyed.* The record is void of any evidence of the existence or state of any accretion or erosion at the time of conveyance to the Appellants. While it has been stipulated that the high water mark corresponded with the eastern edge of Beach Drive on July 4, 1911 when the plat was recorded, the subdivision lots were not conveyed on that date. If even one inch of land had accreted to Beach Drive prior to the conveyance of the lots, it would appear that even under this Court's decision herein, the grantors would have been the owners of land on the eastern side of Beach Drive and therefore would, without question, have retained title to the underlying fee in the eastern half of Beach Drive. Appellees question whether this Court intended to allow Appellants, upon whom the burden of proof rests, to prevail as to title to the accreted land without presenting any evidence upon which such claim of title may be based. Appellees, feeling that such a result was not intended, have filed this Motion for Rehearing.

Appellees also question whether this Court intended a construction of Section 3 of the 1902 Act which leaves meaningless the major portion of the statute. The only words of the statute which are given effect under the Court's interpretation are "the exclusive

right to the oysters and clams." The words "For all purposes," "among others," and the proviso preserving public rights in the foreshore are left without meaning. In addition, the term "boundaries" as used in the act is left meaningless since the phrase is "boundaries *and* rights" not "boundaries *of* rights." This Court's construction of the statute, reaching as it does a result inconsistent with the clear terms of the statute and resulting in the taking of property belonging to those who own land adjacent to navigable tidewaters, constitutes an unconstitutional taking of private property for public purposes without compensation in violation of the Fifth Amendment of the Constitution of the United States and Art. I, Sec. III, Par. I of the Georgia Constitution of 1945. Appellees, feeling that such a result was not intended by this Court, have filed this Motion for Rehearing.

GROUNDS OF MOTION

I.

The Court has erroneously construed or misapplied the following controlling authorities that indicate that the "marginal road" presumption is only applicable where *nothing* is retained beyond the road and is not applicable where valuable rights are retained:

Johnson v. Arnold, 91 Ga. 659 (1892)

Jones v. Trulington, 92 S.E.2d 75 (N.C. 1956)

II.

The Court has overlooked the following controlling authorities which indicate that a conveyance of land

bounded by a street or highway which is itself bounded on the other side by a body of water carries title only to the center of the street or highway:

Banks v. Ogden, 69 U.S. (2Wall.) 57, 17 L.ed. 818 (1865)

Marshall v. Hartman, 139 So. 441 (Fla. 1932)

11 C.J.S. Boundaries §35(3)

III.

The Court has overlooked the fact that, even if it should be held that retention of property rights on the far side of the street is not sufficient to support a retention of title by the grantor in that half of the street, an issue of fact remains. This factual issue is whether any accretion occurred on the eastern edge of Beach Drive between July 4, 1911 and the respective dates of the conveyances of lots bordering on Beach Drive to Appellants. Any such accretion, to which future accretion would have attached, would have constituted land retained by the grantors so as to preserve title to the eastern half of Beach Drive in the grantors.

IV.

The Court has erroneously construed and interpretated Section 3 of the 1902 Act (Ga. Code §85-1309) which extended the title of owners of land bordering on navigable tidewaters to the low water mark.

V.

The Court has erroneously construed *Johnson v. State*, 114 Ga. 790 (1902), which provides the basis for the intent in the enactment of the 1902 Act.

VI.

The Court has overlooked the following controlling authorities which indicate that the 1902 Act conveyed title to the foreshore to the adjoining property owners:

West v. Baumgartner, 124 Ga. App. 318 (1971), rev'd on other grounds, 228 Ga. 671 (1972)

Aiken v. Wallace, 134 Ga. 873 (1910)

VII.

The Court has overlooked the following controlling authorities which indicate that a statute must be construed so as to give meaning to the entire statute if possible:

The Postmaster-General of the United States v. Early, 25 U.S. 136 (1827)

Green v. King Edward Employees' Federal Credit Union, 373 F.2d 613 (5th Cir. 1967)

Boyles v. Steine, 224 Ga. 392 (1968)

Undercofler v. Colonial Pipeline Co., 114 Ga. App. 739 (1966)

VIII.

The Court has overlooked the fact that its construction of Section 3 of the 1902 Act results in a taking of personal property for public purposes without compensation in violation of the Fifth Amendment to the Constitution of the United States.

IX.

The Court has overlooked the fact that its construction of Section 3 of the 1902 Act results in a taking of personal property for public purposes without compensation in violation of art. I, Sec. III, Par. I of the Georgia Constitution of 1945.

Upon each and every ground of this Motion, Appellees respectfully submit that a rehearing should be granted and the decision of this Court reversed.

/s/ CARL E. SANDERS
Carl E. Sanders
/s/ JOHN J. DALTON
John J. Dalton
/s/ JUNE ANN McCLURE
June Ann McClure
ATTORNEYS FOR APPELLEES

TROUTMAN, SANDERS, LOCKERMAN & ASHMORE
1400 Candler Building
Atlanta, Georgia 30303

404 658-8014

CERTIFICATE OF SERVICE

I, John Dalton, counsel for Appellees, hereby certify that I have this day served a copy of the within and foregoing Motion for Rehearing by mailing a copy thereof, postage prepaid and properly addressed to counsel of record for all parties.

This the 5th day of March, 1976.

/s/ JOHN J. DALTON
John J. Dalton

APPENDIX V

In the Supreme Court of Georgia

STATE OF GEORGIA,
Appellant,

versus NO. 30176

JACK P. ASHMORE, JR., et al.,
Appellees.

ALVA B. LINES, et al.,
Appellants,

versus
NO. 30177

JACK P. ASHMORE, JR., et al.,
Appellees.

BRIEF IN SUPPORT OF APPELLEES' MOTION FOR REHEARING

I. *The Marginal Road Presumption Is Not Applicable When Property Rights Are Retained Beyond the Road.*

The rule established in *Johnson v. Arnold*, 91 Ga. 659 (1892), is not applicable in the present case. The Court in the *Johnson* case held that where a grantor conveys a tract of land bounded on one side by a road in which he holds the fee, with the grantor holding no "interest" on the other side of the road, and the proprietor on the opposite side having no ownership interest in the road, it is presumed that the grantor intended to pass the grantee the fee in the whole road. In that case the grantor held no rights of any kind in the land beyond the road. The *Johnson* case established only that the presumption applied in such a case, where *nothing* is retained beyond the road.

The Court did not address itself to the situation where the grantor retains valuable rights on the side of the road opposite the tract granted. It is this situation which exists in the present case. The grantors, Appellees' predecessor in title, held fee title to the land west of Beach Drive, the underlying fee in the land designated as Beach Drive, and the exclusive right to take oysters and clams from and cultivate such shellfish in the foreshore. While the grantors conveyed their interests to the west of Beach Drive, they did not convey their interests on the eastern side of Beach Drive. Nor did they convey land extending to the water, so as to give rise to the presumption that

they intended to convey their valuable rights in the foreshore.

The retention of rights in the foreshore has long been established as a basis for not applying the marginal road presumption, even when those rights are merely the ordinary riparian rights, not including an easement type right specially granted by the state legislature. 11 C.J.S. Boundaries §35(3) provides,

> "A conveyance of land bounded by a street or highway which is itself bounded on the other side by a body of water carries title only to the center of the street or highway, unless an intention to make the river rather than the street the boundary appears."

The basis for this rule is that the grantor will not be presumed to have conveyed valuable riparian rights without some indication of an intent to do so.

In *Marshall v. Hartman*, 139 So. 441, 445 (Fla. 1032), the court indicated that purchase of a lot abutting on a platted street, the other side of which is navigable water, should not necessarily carry with it title to more than half of the street unless title to the riparian rights on the other side of the street were *specifically granted also*. The court stated,

> "In 27 R.C.L. 1076, it is said: 'It has been held that the owner of a piece of land on a navigable river, though a strip of such land along the river had become a public street by a common law dedication, continues to be the riparian

proprietor in respect of his ownership of the fee in the half of the street between the center and the river, even after he had conveyed the land, if the deed describes it as extending to the street.' And it has been held by very respectable authorities that the grantees of the original owner of lots bounded on such a street take the ultimate fee only to the center of the street subject to the public easement, and acquire no riparian rights in the waters on the other side of such street. Demopolis v. Webb, 87 Ala. 659, 6 So. 408; Note in 22 L.R.A. (N.S.) 674." 139 So. at 446.

Jones v. Turlington, 92 S.E.2d 75 (N.C. 1956), cited by this Court, is in no way in conflict with this general rule In that case the lateral boundary lines of the lot in question extended across the full width of the street to the ordinary high water mark of the Intra-Coastal Waterway without reservation, and the map stated that "the lots carry full riparian rights." The court merely held that the conveyance carried the fee in the land covered by the street which was included within the boundary lines as drawn. In addition, the facts of the case complied with the general rule in that the riparian rights were specifically granted. This case would in no way provide precedent for a situation where the lot was described as bordering on the street and the lot lines were not extended to the water.

Even the United States Supreme Court has recognized the general rule that the grant of a tract of land bounded by a street which is in turn bounded by navigable water conveys the fee in the street only to the center, the fee in the other half of the street remaining in the grantor. *Banks v. Ogden*, 69 U.S. (2 Wall.) 57, 17 L.ed. 818 (1865). In *Banks v. Ogden*, 69 U.S. 57, discussed at length in Appellees' original brief before this Court, the United States Supreme Court specifically held that the original owner of the subdivided property retained a fee ownership in the half of the dedicated street bordering on the water, which therefore entitled the original grantor and his successors in interest to all the benefits of accretion forming upon that part of the street.

This general rule is applied where just or only riparian rights are retained on the far side of the road. There is an even greater need for such a rule where additional valuable rights are retained. The Court in *Johnson v. Arnold*, 91 Ga. 659, demonstrated that it would be in agreement with such a general rule by the basis of its acceptance of the marginal road presumption. The Court recognized that title to half a road, held in conjunction with ownership of the adjoining property would enhance the value of such property. The Court further recognized that holding in detached ownership would tend to be unproductive and valueless. Such a strip held in connection with a valuable property right such as the exclusive right in the foreshore to oysters and clams could be very valuable and in no way useless, and would therefore fall within that type of factual situation to which the marginal road presumption is not applicable.

As Appellees' predecessors in title were entitled to the underlying fee in the eastern half of Beach Drive, they were also entitled to the property which accreted thereto. Thus Appellees now hold title, as successors

in interest, to the accreted property in question. Based on the foregoing authorities, Appellees respectfully submit that this Court reverse its decision and affirm the decision of the lower court as to title to the accreted land.

II. *Appellant Subdivision Owners Cannot Take Title to the Accreted Land Without the Determination of Remaining Issues of Fact.*

It was stipulated by the parties that the high water mark on July 4, 1911, was located as depicted on a plat of East End subdivision, i.e., on the eastern edge of Beach Drive, recorded on that date. (R-165-166). However, the conveyance of all lots bounded on the east by Beach Drive occurred subsequent to that date. The location of the high water mark on the dates of the conveyances of said lots from the original grantors has not been established. There has, in fact, been no evidence offered as to the location of the high water mark on the many conveyance dates. Yet any claim which Appellants may have to title to the accreted land is dependent upon the location of the high water mark on the dates of such original conveyances.

It was also stipulated that the property which is the subject matter of this action has been formed by accretion over the years since 1911. (R-165). If any of this accretion occurred prior to the conveyance by the original grantor of a particular lot bounded by Beach Drive, then at the time of the conveyance of such lot, the grantor would have held title to land to the east of Beach Drive. Seemingly, even under the majority

opinion of this Court without modification, there would have been no question that the grantor retained title to the eastern half of Beach Drive with the purchaser's title extending only to the center line of said platted street.

There still exists an issue of fact as to the location of the high water mark on the date each lot was originally conveyed, and a separate finding must be made as to the claim of each individual lot owner. Therefore, should this Court determine that Georgia would apply the marginal road presumption even though the grantor retained valuable property rights on the side of the road opposite the tract conveyed, Appellees respectfully submit that the issue of title to the accreted land must be remanded to the trial court for a determination of the remaining issues of fact. It would be unconscionable to allow Appellants to take title to this land from Appellees under the decision herein without first establishing the facts upon which such title must be based.

III. *This Court's Construction of Section 3 of the 1902 Act Is In Conflict With the Clear Meaning of the Statute and Results In An Unconstitutional Taking of Private Property For Public Purposes Without Compensation In Violation of The Fifth Amendment of the Constitution of the United States.*

As pointed out in this Court's Opinion, the 1902 Act was enacted to overcome the decision in *Johnson v. State*, 114 Ga. 790 (1902). Thus, it is important to examine precisely what was done in the *Johnson* case and what position was taken by the Court.

The Court held that §3060 (Ga. Code. Ann. §85-1304) was not applicable to navigable tidewaters. While the Court, in reference to §3060, spoke in terms of a legislative purpose to insure rights to river bottoms for agricultural purposes, the Court did not construe the meaning of §3060 to be merely a grant of agricultural rights. In fact, the opinion itself indicates that the Court assumed that the legislature had accomplished its purpose as to non-tidal streams by the grant of title. It is inherent in the opinion that had the Court found §3060 to be applicable to navigable tidewaters, it would have found that title in the land in question extended to the low water mark.

One other Georgia Supreme Court opinion indicates that it was understood that Section 3 of the 1902 Act was intended to extend title. *Aiken v. Wallace*, 134 Ga. 873 (1910), involved a dispute between two individuals as to the ownership of a portion of land between high and low water marks on St. Simons Island. The original land grant to the property in question was to the low water mark, so the 1902 Act was not directly in controversy. However, in response to defendant's contention that the 1902 Act extended her title to low water mark by virtue of her ownership to high water mark, the Court stated,

> "The act of 190 (Acts 1902, p. 108) did not affect the case. It did not undertake to take the title to land from one person and confer it upon another."

Thus, while the 1902 Act did not take title from one private party who held it at the time of the act, so as to convey it to the property owner holding title to the

high water mark, the Court's statement clearly indicates that the 1902 Act did undertake to pass some title. The only title which it could convey was that held by the state, and it was this title which was granted to those who held property adjacent to navigable tidewater.

In *West v. Baumgartner*, 124 Ga. App. 318 (1971), rev'd on other grounds 228 Ga. 671 (1972), the court held that the grant of title in Section 1 of the 1902 Act did not include the exclusive right of fishery. There the court stated,

> "Since, in this case, the act of the State (the Act of 1902) conveying *title* to the lands in the bed of the *navigable* and non-navigable tidal streams as defined in that Act has been ratified and affirmed by the people in a constitutional amendment (Art. II, Sec. VI, Par. I of the Constitution of 1945; Code Ann. §2-601), it is not necessary to determine whether the State's right in the land and the waters was a proprietary interest or was in trust for the benefit of the public, which may involve different rights in the State, particularly insofar as the right of the State to give exclusive rights of fishery to one member of the public over another member of the public." [Emphasis added.] 124 Ga. App. at 324.

This is a clear statement that the 1902 Act conveyed title, not only in Section 1 as to non-navigable tidal streams, but also in Section 3 as to navigable tidewaters.

The very language of Section 3 of the 1902 Act shows clearly that title was intended to be extended to the low water mark. The provision as to oysters and clams is merely a parenthetical, set off from the body of the statute which provides, "For all purposes . . . the boundaries and rights . . . shall extend to low-water mark." It must be assumed "that the legislative purpose is expressed by the ordinary meaning of the words used in the statute." *Green v. King Edward Employees' Federal Credit Union*, 373 F.2d 613 (5th Cir. 1967). The ordinary meaning of the word boundary in reference to property is the extent of one's title. Black's Law Dictionary defines boundary in the following fashion:

> "By boundary is understood, in general, every separation, natural or artificial, which marks the confines or line of division of two contiguous estates."

In *Outlaw v. Outlaw*, 225 Ga. 100 (1969), the Court used "boundary" synonymously with "title" when it referred to the rule that "It is well settled . . . that where land is bounded by a non-navigable stream the boundary extends to the center or thread of the stream." In the same fashion, the boundary or title of one who owns land adjacent to navigable tidewaters extends to the low water mark.

This Court's construction of the 1902 Act violates the cardinal rule of statutory construction "that effect should be given to all of the provisions of a statute, if reasonably possible." *Green v. King Edward Employees' Federal Credit Union*, 373 F.2d at 616. In *Boyles v. Steine*, 224 Ga. 392 (1968), the Court stated,

> "In arriving at this intent of the legislature, it is also fundamental that all of the words of the statute are to be given due weight and meaning (*Falligant v. Barrow*, 133 Ga. 87, 92 (65 SE 149) and that the court is not authorized to disregard any of the words of the statute in question unless the failure to do so would lead to an absurdity manifestly not intended by the legislature. *Gillis v. Gillis*, 96 Ga. 1, 9 (23 SE 107, 30 LRA 143, 50 ASR 121)." 224 Ga. at 395.

There the Court construed the statute in question so as not to render utterly meaningless the words not "be eligible to succeed himself." In *Undercofler v. Colonial Pipeline Co.*, 114 Ga. App. 739 (1966), the court stated,

> "Courts should not so interpret a statute as to make parts of its surplusage unless no other construction is reasonably possible. All the words of the legislature, however numerous, ought to be preserved, and effect given to the whole, if it can be done. *Smith v. Davis*, 85 Ga. 625, 631 (11 SE 1024); *Hicks v. Smith*, 94 Ga. 809, 815 (22 SE 153)." 114 Ga. App. at 743.

In *The Postmaster-General of the United States v. Early*, 25 U.S. 136 (1827), a case arising in Georgia in which Georgia law was applied, Chief Justice Marshall of the United States Supreme Court stated,

> "What is the meaning and purport of the words 'concurrent with' the circuit courts of the United States? Are they entirely senseless? Are they to be excluded from the clause in which

the legislature has inserted them, or are they to be taken into view, and allowed the effect of which they are capable?

The words are certainly not senseless. They have a plain and obvious meaning. And it is, we think, a rule, that words which have a meaning are not to be entirely disregarded in construing a statute. We cannot understand this clause as if these words were excluded from it." 25 U.S. at 147-48.

This Court's construction of Section 3 of the 1902 Act leaves meaningless the phrases "For all purposes," "including among others," "the boundaries and rights," and the proviso preserving public rights in the foreshore. If nothing more than "the exclusive right to the oysters and clams" had been given, that could have been stated clearly. There would have been no need for the statement that "For all purposes" the boundaries shall extend to low-water mark. The statute states that these purposes are to *include* the exclusive right to oysters and clams, but it in no way indicates that the purposes are *limited* to such an exclusive right. In fact, the right to oysters and clams is included "*among others.*" If merely the exclusive right to oysters and clams was granted, what are the other purposes? "Among others" is totally read out of the statute.

The provision as to oysters and clams was included in the statute merely as a clarification of the rights in the property, title to which was being granted. Prior to the 1902 Act, the State held title to the foreshore, but it held such title subject to the public trust rights. The

right of fisheries was one of the public trust rights. The legislature apparently desired to make it perfectly clear that it was not attempting to convey the public right of fishing, which right was specifically excluded, "(but not to include other fish)." However, it was necessary, to avoid future misunderstanding, that the possibility not be left open that shellfish could be classed with other fish, the right to take which was preserved for the public. It was only for this purpose that the legislature made specific reference to the right of oysters and clams.

The proviso was also designed to clarify rights in the foreshore. The State's title to the land between the high and low water marks was also subject to the public trust rights of passage and navigation. The legislature apparently felt it was necessary to clarify the fact that, while it was granting the title the state held to the land, it was not attempting to convey the public rights in such land. It only becomes necessary to preserve such rights if title to the land is granted. If nothing more than the exclusive right to oysters and clams had been granted, it would not have been necessary to provide for the protection of the public trust rights.

Finally, it is not reasonable that "boundaries" as used in the statute should refer only to the limit of the right to take oysters and clams. The statute does not state that the boundary of the right to take oysters and clams shall extend to low water mark. Instead, it states that "the boundaries *and* rights" shall so extend. The word "boundaries" should not be so interpreted as to make it mere surplusage. *Undercofler v.*

Colonial Pipeline Co., 114 Ga. App. at 743. The use of "boundaries" in the conjunctive with "rights" indicates that something more than merely the right to take oysters and clams is intended. In addition, in reference to oysters and clams, the legislature used the term "right" in the singular, however in reference to the extention to the low-water mark, the term becomes "rights" in the plural. This indicates that not only were the boundaries extended, but also more than one right was given within this area. Just as with the phrase "among others," this Court's construction of the statute ignores these additional rights.

This Court's construction of the 1902 Act, far from giving due weight and meaning to all the words of the statute and giving effect to all of the provisions of the statute, renders meaningless the major portion of the statute. This Court would have us read the statute as follows: "The exclusive right to the oysters and clams of owners of land adjacent to or covered in whole or in part by navigable tidewaters, as defined in the preceding section, shall extend to low-water mark in the bed of the water." If this had been the intention of the legislature, it was not necessary that the other provisions of the statute be included. Since such additional provisions were included, it is the duty of this Court to give them meaning rather than to ignore them.

Once title to the foreshore became vested, by virtue of the 1902 Act, in private owners, the legislature could not have changed its mind and passed a subsequent statute reclaiming such land without compensating the owners of the land. Yet this is precisely what this Court has done by its construction which is in conflict

with the plain meaning of the statute. Not only does this constitute judicial legislation, it also constitutes a taking of private property for declared public purposes without compensation. This is not only in direct violation of the Fifth Amendment of the Constitution of the United States but also Art. I, Sec. III, Par. I of the Constitution of this Sovereign State. Based on the foregoing, Appellees respectfully submit that a rehearing should be granted and the decision of this Court reversed.

/s/ CARL E. SANDERS
Carl E. Sanders
/s/ JOHN J. DALTON
John J. Dalton
/s/ JUNE ANN McCLURE
June Ann McClure

ATTORNEYS FOR
APPELLEES

TROUTMAN, SANDERS, LOCKERMAN &
ASHMORE
1400 Candler Building
Atlanta, Georgia 30303

404 658-8000

CERTIFICATE OF SERVICE

I, John J. Dalton, counsel for Appellees, hereby certify that I have this day served a copy of the within and foregoing Brief in Support of Appellees' Motion for Rehearing by mailing a copy thereof, postage prepaid and properly addressed, to counsel of record for all parties.

This the 5th day of March, 1976.

/s/ JOHN J. DALTON
John J. Dalton